Oral Argument Not Yet Scheduled

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

NOS. 06-1364 & 07-1092

NETWORKIP, LLC AND NETWORK ENHANCED TELECOM, LLP,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the Federal Communications Commission and in this Court are listed in the Brief for Petitioners.

B. Ruling Under Review

APCC Services, Inc. v. NetworkIP, LLC, 21 FCC Rcd 10488 (2006) (JA); and *APCC Services, Inc. v. NetworkIP, LLC*, 22 FCC Rcd 4286 (2007) (JA).

C. Related Cases

The orders on review have not previously been before this Court. Counsel are not aware of any related cases that are pending before this or any other court.

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GLOSSARY

APCC	intervenors supporting the FCC in this case
ICA	Interstate Commerce Act
ICC	Interstate Commerce Commission
IXC	interexchange carrier
LEC	local exchange carrier
NET	petitioners in this case
PSP	payphone service provider

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

Congress has mandated that operators of payphones (known as payphone service providers or "PSPs") must be compensated for every call made from their payphones. 47 U.S.C. § 276(b). To fulfill that congressional mandate, the Federal Communications Commission adopted rules establishing a payphone compensation rate ($.24 per call) and specifying which party must pay a PSP when multiple entities collaborate to complete a payphone call.

Petitioners NetworkIP, LLC and Network Enhanced Telecom, LLP (collectively, "NET") collaborated with other entities (collectively called the "Debit Card Providers") to complete calls from payphones. The PSPs that operated those payphones tried to collect payment from NET for the calls, but NET asserted that the PSPs instead should seek compensation from the Debit Card

Providers. When NET refused to pay, the PSPs, represented by payphone service collection agents (collectively, "APCC"), filed a complaint with the FCC under 47 U.S.C. § 208.

The parties stipulated that liability in this proceeding hinged on whether NET or the Debit Card Providers were responsible for paying APCC under FCC rules. The Commission, interpreting its own rules and orders, ruled that NET – not the Debit Card Providers – was liable for compensating APCC.[1] In a subsequent order, the agency awarded damages to APCC in the amount of $2,789,505.84 plus prejudgment interest at an annual rate of 11.25 percent.[2]

NET now seeks review of the Commission's rulings on liability and damages. This case presents the following issues for review:

(1) whether the Commission properly applied its own rules when it determined that NET was responsible for compensating APCC for certain payphone calls made between 1999 and 2001;

(2) whether the Commission reasonably decided to waive a procedural rule that, if strictly enforced, would have barred APCC from recovering much of the payphone compensation to which it was entitled under 47 U.S.C. § 276; and

(3) whether, consistent with its own precedent, the Commission reasonably awarded prejudgment interest to APCC at an annual rate of 11.25 percent.

<u>JURISDICTION</u>

NET challenges two orders of the Federal Communications Commission. In the *Liability Order*, issued on September 15, 2006, the Commission found that NET violated section 201(b)

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[1] *APCC Services, Inc. v. NetworkIP, LLC,* Order on Review, 21 FCC Rcd 10488 (2006) (JA) ("*Liability Order*"), *affirming* Memorandum Opinion and Order, 20 FCC Rcd 2073 (Enf. Bur. 2005) (JA) ("*Bureau Liability Order*").

[2] *APCC Services, Inc. v. NetworkIP, LLC,* Memorandum Opinion and Order, 22 FCC Rcd 4286 (2007) (JA) ("*Damages Order*").

of the Communications Act, 47 U.S.C. § 201(b), by failing to pay APCC in accordance with FCC rules. In the *Damages Order*, issued on February 23, 2007, the Commission directed NET to pay more than $2.7 million in damages to APCC. NET filed petitions for review of these orders within the time frame prescribed by 28 U.S.C. § 2344. This Court has jurisdiction to review both orders under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

APCC, which has intervened in this proceeding, filed a motion to dismiss NET's petition for review of the *Damages Order* in No. 07-1092. (APCC does not dispute that the Court has exclusive jurisdiction over the *Liability Order*.) By order dated June 26, 2007, the Court directed the parties to address in their briefs the issues presented in APCC's motion to dismiss. That motion (which APCC later withdrew) took the position that this Court lacks jurisdiction to review the *Damages Order*. To the contrary, the Court plainly has jurisdiction.

With certain limited exceptions specified in 47 U.S.C. § 402(b) – none of which applies here – "*[a]ny proceeding* to enjoin, set aside, annul, or suspend *any order* of the Commission … shall be brought as provided by and in the manner prescribed" by the Hobbs Act. 47 U.S.C. § 402(a) (emphasis added). And the Hobbs Act provides: "The court of appeals … has *exclusive jurisdiction* to enjoin, set aside, suspend … or to determine the validity of *all final orders* of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)]." 28 U.S.C. § 2342(1) (emphasis added). Those provisions clearly establish this Court's jurisdiction over both of NET's petitions for review, each of which seeks to "set aside" an "order of the Commission."

Section 407 of the Communications Act, 47 U.S.C. § 407, allows successful complainants before the Commission to enforce awards of money damages in district or state courts. Section 407 also grants complainants certain procedural advantages. In its motion, APCC relied on the Supreme Court's decision in *ICC v. Atlantic Coast Line Railway Co.,* 383

U.S. 576 (1966), applying a similar provision of the Interstate Commerce Act ("ICA"), to argue that section 407 deprives this Court of jurisdiction over the FCC's *Damages Order*. But *Atlantic Coast Line* does not support that conclusion.

In *Atlantic Coast Line*, a shipper that complained of violations of the ICA won both a liability determination and a damages award from the Interstate Commerce Commission ("ICC"). The shipper then filed suit in district court in New York to enforce the award under section 16(2) of the ICA, the analogue to section 407 of the Communications Act. At the same time, the carrier/defendant filed suit under section 17(9) of the ICA in district court in Florida to challenge the liability portion of the ICC's order. *Atlantic Coast Line,* 383 U.S. at 577-78. In order to preserve the shipper's procedural advantages under section 16(2), the Supreme Court ruled that the shipper's enforcement action should go forward in the New York district court, and that the carrier could only bring its challenge to the ICC order as a cross-action in the same court. *Id.* at 589-606.

In its motion to dismiss, APCC argued that the FCC's *Damages Order*, like the ICC order in *Atlantic Coast Line*, must be reviewed by a district court. But the approach advocated by APCC would produce a far different outcome from the *Atlantic Coast Line* decision. While giving due consideration to the rights of shippers in "harmoniz[ing]" the enforcement and review provisions of the ICA, *Atlantic Coast Line,* 383 U.S. at 586, the Supreme Court did not lose sight of the need for judicial efficiency in the process. Thus, where an award of damages is combined with a cease-and-desist order, the Court reaffirmed that a carrier can seek review of both matters in one court. *Ibid.* And when only a damages order is at issue, the Court noted that the carrier can usually secure review in the forum chosen by the shipper, so that a single court can review both the carrier's and the shipper's claims in one combined proceeding. *Id.* at 589, 605.

APCC's motion took the opposite tack. It construed the Communications Act to require that two different courts separately review FCC rulings on liability and damages. Under APCC's reading of the statute, this Court would review the *Liability Order*, while a district court (selected by APCC) would review the *Damages Order.*[3]

There is no good reason to adopt this splintered framework for judicial review of the FCC's orders. Such an approach would clash with the principles of judicial economy that the Supreme Court embraced in *Atlantic Coast Line* and its companion case, *Consolo v. Federal Maritime Commission,* 383 U.S. 607 (1966). In *Consolo,* a shipper that won an agency damages award against a carrier sought Hobbs Act review in the court of appeals to increase the award. Given that the court of appeals unquestionably had jurisdiction to review the shipper's claims, the Supreme Court decided that the court of appeals should also review the carrier's challenge to the damages award, notwithstanding a statute (like section 16(2) of the ICA and section 407 of the Communications Act) that required enforcement proceedings to take place in district court: "The minimal disadvantages resulting to the shipper from permitting the carrier to attack the reparation order [in the court of appeals] are more than offset by the desirability of a prompt and efficient determination of the validity of the Commission's order." *Consolo,* 383 U.S. at 616. The court found that "it would make little sense to require the carrier to break off his argument short of its logical conclusion and relitigate it anew before a district court in an enforcement action." *Id.* at 617.

Under *Verizon Telephone Cos. v. FCC,* 269 F.3d 1098, 1103-06 (D.C. Cir. 2001), the Court has exclusive jurisdiction to review the *Liability Order*, so APCC is effectively in the same

[3] APCC has filed a section 407 enforcement action in the United States district court for the Eastern District of Virginia. *APCC Services, Inc. v. NetworkIP, LLC,* No. 1:07-CV-549 (E.D. Va. filed June 5, 2007). That proceeding has been stayed pending the resolution of this case.

position as the shipper in *Consolo.* Here, as in *Consolo,* it would make little sense for two different courts to review aspects of the same agency proceeding.[4]

The position taken by APCC's motion also conflicts with this Court's holding in *Shell Oil Co. v. FERC,* 47 F.3d 1186 (D.C. Cir. 1995). There, a single agency order combined elements that were reviewable exclusively in the court of appeals with other elements that were reviewable in district court. The Court held that "where an agency order arising from a common factual background and addressing a common question of law relies on two statutory bases that give rise to separate paths for judicial review, the entire order should be reviewed in a comprehensive and coherent fashion" by "the court of appeals." *Id.* at 1195.

Consistent with these precedents, the Court in this case should review the Commission's rulings on both liability and damages in a single proceeding, leaving only subsequent enforcement (if necessary) to another court under section 407. *See Consolo,* 383 U.S. at 617-18.

For all of these reasons, and for the additional reasons discussed in Verizon's amicus brief, the Court has jurisdiction to review the *Damages Order*.

STATUTES AND REGULATIONS

Except for section 405 of the Communications Act, 47 U.S.C. § 405, which is set forth in an addendum to this brief, pertinent statutes and regulations are appended to NET's brief.

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[4] *See also Consolidated Rail Corp. v. ICC,* 685 F.2d 687, 692 n.12 (D.C. Cir. 1982) ("the Courts of Appeals may review ICC reparations orders" when such orders are accompanied by other ICC orders that are subject to the exclusive jurisdiction of courts of appeals) (citing *Atlantic Coast Line,* 383 U.S. at 586).

COUNTERSTATEMENT

A. Regulatory Background: Compensation For Coinless Payphone Calls Under Section 276

Although the proliferation of wireless phones has caused a substantial decline in payphone use, payphones continue to play an important role in serving the public. Payphones "provide a unique back-up communications option when subscription services – whether wireline or wireless – are unaffordable or unavailable." *Liability Order* at n.47 (JA) (internal quotations omitted). "Payphone services are particularly critical to those with few other communications service options – including low-income customers, the elderly, and residents of rural areas. Payphones also enhance access to emergency (public health and safety) services." *Ibid.*

Historically, PSPs have not always received compensation for the services they rendered. Payphone users sometimes paid for their calls by depositing coins into payphones. But PSPs typically received no payment for "dial-around" (*i.e.,* coinless) payphone calls, including access code calls "to 800 numbers or 10XXX numbers that the caller uses to reach the long-distance carrier of his choice" and "subscriber 800 calls," which are usually routed to businesses (*e.g.,* 1-800-FLOWERS). *Illinois Public Telecommunications Association v. FCC,* 117 F.3d 555, 559 (D.C. Cir. 1997) ("*IPTA*"), *cert. denied,* 523 U.S. 1046 (1998).

Congress recognized that payphone service could not be sustained without an adequate compensation system. To address the problem of uncompensated payphone calls, Congress in 1996 added section 276 to the Communications Act. That provision directs the FCC to "promote the widespread deployment of payphone services" by (among other things) "establish[ing] a per call compensation plan to ensure that all [PSPs] are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A).

When the FCC adopted rules to implement section 276, it decided that PSPs should receive compensation for coinless payphone calls from carriers transmitting those calls, not from the callers themselves. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd 20541, 20584-85 (¶¶ 83-85) (1996) ("*First Payphone Order*"). This Court upheld the Commission's "carrier pays" approach. *IPTA,* 117 F.3d at 566-67.

Before implementing a "carrier pays" regime, the Commission had to determine which carrier should pay the PSP when multiple carriers are involved in carrying a long-distance call from a payphone. That sort of call often involves multiple carriers. The call "is initially received by the local exchange carrier ('LEC') that services the payphone"; the LEC then "routes the call to a long-distance carrier, typically an interexchange carrier ('IXC')"; and the IXC either "transmit[s] the call to the LEC that serves the customer" or "transfers the call to a 'reseller' of the IXC's services." *Sprint Corp. v. FCC,* 315 F.3d 369, 371 (D.C. Cir. 2003). A call may be transferred to one or more resellers of interexchange service before being terminated by the LEC serving the recipient. Two types of resellers handle payphone calls. Switch-based resellers "possess their own switching capacities." *Ibid.* By contrast, "switchless" resellers "do not possess their own switching facilities and must rely on an IXC to perform the switching and transmission functions that are required to complete a call." *Ibid.*

The Commission concluded that, "in the interests of administrative efficiency and lower costs, facilities-based carriers" of coinless payphone calls "should pay the per-call compensation for the calls received by their reseller customers." *First Payphone Order,* 11 FCC Rcd at 20586 (¶ 86). The Commission reasoned that imposing compensation liability on non-facilities-based resellers would be problematic because those resellers would have difficulty tracking payphone calls, and because they would be hard for PSPs to identify among the series of entities that participate in the completion of a payphone call. *Ibid.*

The Commission subsequently clarified that "a carrier is required to pay compensation and provide per-call tracking for the calls originated by payphones if the carrier maintains its own switching capability, regardless if the switching equipment is owned or leased by the carrier." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd 21233, 21277 (¶ 92) (1996) ("*First Payphone Reconsideration Order*"). The agency further explained: "If a carrier does not maintain its own switching capability, then ... the underlying [facilities-based] carrier remains obligated to pay compensation to the PSP in lieu of its customer that does not maintain a switching capability." *Ibid.*

To facilitate the calculation of payments due to PSPs, the Commission prescribed a per-call compensation rate for coinless payphone calls. The agency's first two attempts to set this rate (initially at $.35, then at $.284) resulted in remands from this Court. *See IPTA,* 117 F.3d at 563-64; *MCI Telecommunications Corp. v. FCC,* 143 F.3d 606, 608-09 (D.C. Cir. 1998). The Commission then reduced the default compensation rate for each dial-around call to $.24. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 14 FCC Rcd 2545, 2632 (¶ 191) (1999) ("*Third Payphone Order*"). On review, this Court upheld the $.24 rate. *American Public Communications Council v. FCC,* 215 F.3d 51 (D.C. Cir. 2000). That rate applies to the calls at issue here.

The Commission also found that an annual interest rate of 11.25 percent should apply to late compensation payments to PSPs. *Third Payphone Order*, 14 FCC Rcd at 2631 (¶ 189). Because most payphones "are owned by large [LECs]," and because the "authorized interstate rate of return" for those LECs – 11.25 percent – represents "a weighted average of debt and equity costs," the Commission reasoned that "11.25% is the appropriate cost of capital for payphone providers" in the context of delayed dial-around compensation. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 13 FCC Rcd 1778, 1806 (¶ 60) (1997) ("*Second Payphone Order*"). The Commission and its Enforcement Bureau have repeatedly applied the 11.25 percent interest rate to cases involving late payments of payphone compensation, whether or not the PSP seeking compensation is a LEC.[5]

B. APCC's Complaint Against NET

NET "is a telecommunications carrier that owns switches," which it uses to route telephone calls. *Liability Order* ¶ 2 (JA). NET also "offers other entities a package of telecommunications services that enables those entities ('Debit Card Providers') to provide pre-paid calling cards to end-user customers." *Ibid.* Consumers can use those calling cards "to make 'coinless' calls from payphones." *Bureau Liability Order* ¶ 2 (JA). But the Debit Card Providers that sell those calling cards "play[ ] no role in actually transporting … coinless payphone calls." *Id.* ¶ 10 (JA). Whenever a payphone call is made with a calling card that uses NET's services, the call is transmitted via NET's switching facilities. The Debit Card Providers neither own nor lease any of the switches that are used to route the calls handled by NET. *Id.* ¶ 16 (JA).

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[5] *See, e.g., Request to Update Default Compensation Rate for Dial-Around Calls from Payphones,* 19 FCC Rcd 15636, 15661 (¶ 79) (2004) ("*Update Order*"); *APCC Services, Inc. v. TS Interactive, Inc.,* 19 FCC Rcd 10456, 10466 (¶ 22) (Enf. Bur. 2004) ("*APCC Services*"); *Illinois Bell Telephone Co. v. One Call Communications, Inc.,* 16 FCC Rcd 16697, 16703 (¶ 13) & n.43 (Enf. Bur. 2001) ("*Illinois Bell*"); *Bell Atlantic-Delaware, Inc. v. Frontier Communications Services, Inc.,* 16 FCC Rcd 8112, 8120 n.43 (2001) ("*Bell Atlantic*").

Between October 1, 1999 and November 22, 2001, more than 11 million calling card calls were placed from APCC's payphones and routed through NET's switches. *See Damages Order* ¶¶ 1, 11 (JA ,). APCC attempted to collect payment for these calls from NET. But NET refused to pay for the calls. It maintained that APCC "should look, instead, to the various Debit Card Providers for compensation." *Bureau Liability Order* ¶ 13 (JA).

Pursuant to 47 U.S.C. § 208, APCC filed with the Commission two informal complaints against NET. The first complaint (filed on March 29, 2002) concerned coinless payphone calls carried by NET and Sprint; the second (submitted on September 30, 2002) involved coinless payphone calls carried by NET and carriers other than Sprint. *Damages Order* ¶ 5 (JA). In both informal complaints, APCC asserted that NET "owed $.24 for each payphone call at issue, because for each of those calls [NET] allegedly was the last identified facilities-based carrier within the meaning of the Commission's rules and orders." *Ibid.*

The parties were unable to negotiate a settlement of their dispute, and APCC ultimately filed a formal section 208 complaint against NET on June 3, 2003. Pursuant to 47 C.F.R. § 1.722(d), APCC requested that the formal complaint proceeding "be limited to a determination of [NET's] liability." Formal Complaint at 1-2 (JA -). APCC indicated that it would "seek a determination of damages by supplemental complaint in a proceeding … separate from and subsequent to this proceeding on liability." *Id.* at 2 (JA).

C. The Enforcement Bureau's Orders

(1) The Bureau Liability Order

APCC and NET agreed that the issue of liability "hinge[d] on whether Defendants [*i.e.,* NET] or their Customers [*i.e.*, the Debit Card Providers]" owed "payphone compensation as a matter of law under the language of the Commission's [*First Payphone Reconsideration Order*], including applicable precedent." Revised Joint Statement at 2 (JA). Specifically, the parties pointed to paragraph 92 of that order, which stated that "a carrier is required to pay compensation and provide per-call tracking for the calls originated by payphones if the carrier maintains its own switching capability, regardless if the switching equipment is owned or leased by the carrier." *Id.* at 3 (JA) (quoting *First Payphone Reconsideration Order*, 11 FCC Rcd at 21277 (¶ 92)). Although APCC and NET interpreted this statement differently, they agreed that paragraph 92 of the *First Payphone Reconsideration Order* held the key to determining whether NET or the Debit Card Providers would be liable to compensate APCC.

In this proceeding, the parties identified only two potential candidates for compensation liability: NET or the Debit Card Providers. The Commission's Enforcement Bureau construed the language of paragraph 92 to mean that where two *facilities-based* carriers have been identified as potentially liable, "with respect to each coinless payphone call, the party responsible for paying the PSP is the last identified '*facilities-based*' carrier that physically routes the call to the recipient's LEC." *Bureau Liability Order* ¶ 8 (JA -). After reviewing the record, the Bureau concluded that the Debit Card Providers could not be liable because they were not "facilities-based" carriers. Therefore, the Bureau found that NET, "and not a Debit Card Provider, is the last 'facilities-based' carrier, and thus is the entity responsible for paying payphone compensation to [APCC]." *Id.* ¶ 14 (JA).

The Bureau based this conclusion on two independent grounds. First, it found that the Debit Card Providers are not "facilities-based" because they do not own or lease any of the switches that were used to complete the payphone calls in question. *Bureau Liability Order* ¶¶ 15-21 (JA -). Second, the Bureau determined that the Debit Card Providers are not liable for dial-around compensation because they do not maintain their own switching capability. *Id.* ¶¶ 22-23 (JA -). The Bureau understood the Commission's reference to "switching capability" in the *First Payphone Reconsideration Order* to include, "at a minimum, the basic switching function of receiving and routing calls" – a function that the Debit Card Providers do not perform. *Id.* ¶ 23 (JA).

The Bureau determined that NET, by failing to pay compensation to APCC in accordance with FCC rules, violated sections 201(b) and 276 of the Communications Act. *Bureau Liability Order* ¶ 26 (JA).[6] Accordingly, the Bureau granted APCC's complaint.

(2) The *Waiver Order*

Under FCC rules, complaints filed against carriers under section 208 of the Communications Act may be either formal or informal. 47 C.F.R. § 1.711. In the informal complaint process, the Commission forwards the complaint to the appropriate carrier for investigation, and the carrier is given an opportunity to resolve the complaint. If the complainant is not satisfied with the carrier's response to the informal complaint, it may file a formal complaint. 47 C.F.R. § 1.717. Formal complaints are generally resolved by the Commission on the basis of a written record consisting of submissions from the parties. 47 C.F.R. § 1.720.

FCC rule 1.718 provides that if certain conditions are satisfied, the filing of a formal complaint "will be deemed to relate back to the filing date" of an unsatisfied informal complaint concerning the same cause of action. 47 C.F.R. § 1.718. This rule applies "only if the formal complaint is filed within six months after the defendant's response to the informal complaint." *APCC Services, Inc. v. NetworkIP, LLC,* 20 FCC Rcd 16727, 16728 (¶ 4) (Enf. Bur. 2005) (JA) ("*Waiver Order*").

[6] Section 201(b) prohibits carriers from engaging in "unjust and unreasonable" practices. 47 U.S.C. § 201(b). A failure to pay payphone compensation in accordance with FCC rules is an "unjust and unreasonable" practice in violation of section 201(b). *See Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.,* 127 S. Ct. 1513 (2007).

APCC filed two informal complaints against NET: one in March 2002 and the other in September 2002. *Damages Order* ¶ 5 (JA). NET never filed a response to the first of these complaints. It filed a response to APCC's second informal complaint on November 19, 2002. *Waiver Order* ¶ 4 (JA). Consequently, "pursuant to the six-month deadline under rule 1.718, May 19, 2003 was the last date on which APCC could file a formal complaint that would relate back to September 30, 2002" (the filing date of the second informal complaint). *Ibid.*

Seeking to invoke the "relation-back" rule, APCC attempted to file its formal complaint on May 19, 2003. However, that filing was rejected by Mellon Bank, the Commission's intake agent, because APCC's counsel submitted the wrong filing fee ($165 per defendant instead of the $170 required by newly amended FCC rules). *Waiver Order* ¶¶ 5-6 (JA). On June 3, 2003, APCC filed a revised version of the formal complaint with the correct filing fee, accompanied by a motion for waiver of rule 1.718 requesting an extension of the rule's filing deadline. *Id.* ¶ 7 (JA).

With one limited exception, the Enforcement Bureau granted APCC's waiver request. It concluded that "the public interest would best be served" by allowing the formal complaint to relate back to September 30, 2002 "for all aspects of APCC's compensation claim, *except* for prejudgment interest accrued during the 15-day period between when APCC should have filed its formal complaint with the correct fee … and when APCC did file its formal complaint with the correct fee." *Waiver Order* ¶ 14 (JA).

The Bureau explained that without a waiver, "the potential recovery period" would be "about nine months shorter." *Waiver Order* ¶ 8 (JA). "Denying a waiver," therefore, could deprive numerous PSPs "of the right to millions of dollars in compensation" – an outcome that, in the Bureau's judgment, would be "inconsistent with the public interest" in ensuring fair payphone compensation under section 276. *Id.* ¶ 11 (JA -) (internal quotations omitted).

The Bureau recognized that the submission of the wrong filing fee by APCC's counsel was "easily avoidable" and "difficult to excuse." *Waiver Order* ¶ 12 (JA). Nonetheless, it found that this error did not prejudice NET, which "knew all along that, in the absence of a settlement, APCC planned to file a formal complaint." *Ibid.* The Bureau further noted that APCC's lawyers promptly "corrected their error and filed another formal complaint 15 days later." *Ibid.* Under these circumstances, the Bureau determined that "waiving the filing deadline would not materially undermine" the deadline's primary purpose: "to ensure finality, certainty, and repose for prospective defendants." *Ibid.*

D. The Orders On Review

(1) The *Liability Order*

NET applied for Commission review of the *Bureau Liability Order*. It asked the Commission to reverse the Bureau's determination that NET was liable to compensate APCC. NET contended that the Bureau erred in ruling that only carriers that own or lease switches are responsible for dial-around payphone compensation. Application for Review at 10-16 (JA -). NET also contested the Bureau's finding that the Debit Card Providers maintain no switching capability. It argued that the Debit Card Providers maintain their own switching capability – and are therefore liable for payphone compensation – because they have the ability "to track call usage and control all other information on the prepaid accounts of end users on a real-time basis through a web-based interface." *Id.* at 17 (JA).

In an order issued in September 2006, the Commission affirmed the *Bureau Liability Order* and denied NET's application for review. *Liability Order* ¶ 1 (JA). The Commission agreed with the Bureau that, "consistent with common industry parlance, the term 'facilities-based' carrier, as used in [the FCC's] payphone compensation rules and orders, means an entity that has a possessory interest in a switch involved in routing the calls for which compensation is sought." *Ibid.* The Commission concluded that NET's contrary construction of Commission precedent "ignores the commonly understood meaning of the term 'facilities-based.'" *Id.* ¶ 6 (JA) (citing *Bureau Liability Order* ¶¶ 15-16, 19 (JA -)).

The Commission also affirmed the Bureau's determination that NET "failed to demonstrate that the Debit Card Providers 'maintain their own switching capability.'" *Liability Order* ¶ 6 (JA). The Commission found that the Debit Card Providers' ability to track calls is "not synonymous" with switching capability, which "encompasses far more functions" than the Debit Card Providers perform. *Ibid.* (JA -) (citing *Bureau Liability Order* ¶¶ 22-23 (JA -)).

Finally, the Commission affirmed the Bureau's ruling that NET's failure to pay dial-around compensation in accordance with FCC rules constitutes an unjust and unreasonable practice that violates section 201(b) of the Act. *Liability Order* ¶¶ 10-16 (JA -).

(2) The *Damages Order*

After the Bureau found NET liable, APCC filed a supplemental complaint for damages. The FCC granted that complaint in February 2007. *Damages Order* ¶ 1 (JA).

For purposes of assessing damages, the parties stipulated that 11,622,941 calls involving APCC's payphones and NET's switches were completed during the period covered by APCC's complaint. Multiplying the stipulated number of calls by $.24 (the applicable per-call compensation rate), the Commission awarded damages to APCC "in the principal amount of $2,789,505.84." *Damages Order* ¶ 11 (JA).

"In addition, consistent with past Commission practice," the agency awarded "prejudgment interest at an annual rate of 11.25%." *Damages Order* ¶ 11 (JA -). The

Commission rejected NET's assertion that any award of prejudgment interest to APCC should be based on "the IRS rate for tax underpayments by large corporations, which is much lower than 11.25%." *Id.* ¶ 13 (JA -). Although the agency acknowledged that it had "applied IRS rates for prejudgment interest in a variety of ... contexts," it pointed out that it had "repeatedly applied and affirmed the 11.25% prejudgment interest rate in the specific payphone context at issue here, *i.e.*, the late payment of per-call dial-around compensation accrued in 1999-2001." *Ibid.* (JA). The Commission declined to depart from that precedent.

The Commission also upheld the Bureau's decision to waive FCC rule 1.718 so that APCC's formal complaint related back to September 30, 2002 (the filing date of the second informal complaint). The Commission found that "a $5.00 fee error by APCC's counsel – as negligent as it may have been – should not deprive APCC" of its right "under section 276 of the Act and [FCC] rules to substantial sums of dial-around compensation, where the formal complaint was otherwise submitted and served on time and in good faith, with advance notice to" NET. *Damages Order* ¶ 23 (JA). In these circumstances, the Commission concluded, "strict enforcement of our six-month relation-back deadline would unduly conflict with the public interest in ensuring the payment of compensation necessary to 'promote the widespread deployment of payphone services to the benefit of the general public.'" *Ibid.* (quoting 47 U.S.C. § 276(b)(1)). Consequently, the Commission denied NET's petition for reconsideration of the *Waiver Order*. *Id.* ¶ 14 (JA).

NET contended that "the *Waiver Order* exceeded the Commission's authority by effectively waiving the statutory limitations period in section 415(b) of the Act." *Damages Order* ¶ 24 (JA). The Commission disagreed. It explained that the *Waiver Order*, which "pertained only to the Commission's relation-back rules," "had no effect on the statutory limitations period," which had already been satisfied by APCC's filing of the informal complaint on September 30, 2002. *Ibid.* In the Commission's view, once the filing of the informal complaint satisfied the statute of limitations, "the question whether APCC's subsequent formal complaint was sufficiently timely" to relate back to the informal complaint's filing date "was a matter purely of the Commission's rules regarding the internal management of its complaint proceedings" – a matter "squarely within the Commission's authority." *Ibid.*

The agency also rejected NET's argument that APCC's waiver request should have been evaluated under the "stricter waiver standard" adopted in *Meredith/New Heritage Strategic Partners, L.P.,* 9 FCC Rcd 6841 (1994) ("*Meredith*"). *Damages Order* ¶¶ 25-27 (JA -). The Commission noted that *Meredith*'s waiver standard "applies only to filing deadlines for pleadings that '*initiate* adjudicatory proceedings.'" *Id.* ¶ 26 (JA) (quoting *Meredith,* 9 FCC Rcd at 6843 (¶ 9)). APCC's informal complaint initiated this proceeding; the subsequently filed "formal complaint simply continued it." *Ibid.* (JA). For that reason, the Commission concluded that the *Meredith* waiver standard did not apply to the filing deadline for APCC's formal complaint.

SUMMARY OF ARGUMENT

At bottom, this case concerns a difference of opinion about the proper interpretation of the FCC's payphone compensation rules and orders. NET asserts that those rules and orders impose compensation liability on its customers, the Debit Card Providers. The Commission, on the other hand, construes its own rules and orders to hold NET – not the Debit Card Providers – responsible for compensating APCC. The Commission's reasonable interpretations of its own rules and orders are owed substantial deference by the Court.

NET maintains (Br. 28) that its reading of FCC precedents and rules is just as reasonable as the Commission's. Even if that were correct, NET could not prevail here. The Court must give controlling weight to the agency's interpretation of its own rules and orders unless that interpretation is plainly wrong. And NET has done nothing to show that the Commission's reading of its own rules and orders was unreasonable in this case.

I. The Commission provided two separate reasons why the Debit Card Providers were not liable for dial-around compensation. First, the Debit Card Providers are not "facilities-based" carriers because they hold no possessory interest in switching facilities. Second, those companies do not "maintain switching capability" because they do not physically route telephone calls. Either one of these rationales was sufficient to justify the Commission's conclusion that NET – not the Debit Card Providers – was responsible for paying APCC.

Under FCC rules, only "facilities-based" carriers are required to pay dial-around compensation. The Commission reasonably found that the Debit Card Providers are not "facilities-based" carriers because they neither own nor lease any of the switches that are used to convey payphone calls. That interpretation of the rules is eminently reasonable. It is generally understood – both within the industry and by this Court – that a carrier cannot be "facilities-based" unless it has a possessory interest in facilities used to complete telephone calls.

FCC rules also provide that only carriers that "maintain switching capability" must pay payphone compensation. The Commission reasonably found that the Debit Card Providers do not "maintain switching capability" because they do not actually route telephone calls. That reading of the rules is also entirely reasonable. As the courts have repeatedly recognized, switching involves the routing of calls through switches. It was reasonable for the Commission to conclude that a carrier could not "maintain switching capability" without performing the most basic switching function: the routing of phone calls.

Many of NET's attacks on the *Liability Order* – including its "fair notice" claim – bear little or no resemblance to the arguments that NET presented to the Commission. Insofar as NET tries to raise claims here that it did not previously present to the Commission, those claims are barred by section 405 of the Communications Act, 47 U.S.C. § 405.

II. The Commission reasonably exercised its discretion when it chose to waive its "relation-back" rule in this proceeding. Without a waiver, a $5.00 fee error by APCC's counsel would have cost numerous PSPs hundreds of thousands of dollars in compensation to which they were entitled under section 276. Under these circumstances, the Commission reasonably concluded that strict enforcement of its relation-back rule in this case would conflict with the public interest in ensuring the payment of sufficient compensation to "promote the widespread deployment of payphone services." 47 U.S.C. § 276(b)(1).

Contrary to NET's contention (Br. 36-38), the waiver here did not improperly extend the two-year statute of limitations set by 47 U.S.C. § 415(b). APCC's filing of an informal complaint satisfied the statute of limitations. "Thereafter, the question whether APCC's subsequent formal complaint was sufficiently timely" to relate back to the informal complaint's filing date "was a matter purely of the Commission's rules regarding the internal management of its complaint proceedings" – a matter "squarely within the Commission's authority." *Damages Order* ¶ 24 (JA).

III. The Commission reasonably awarded prejudgment interest to APCC at an annual rate of 11.25 percent. That rate was based on a longstanding FCC determination regarding the average cost of capital for most PSPs. The Commission had repeatedly applied that interest rate in cases involving late compensation payments to PSPs. It saw no reason to depart from that precedent here.

STANDARD OF REVIEW

The Court must uphold the Commission's orders in this case unless it finds that they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is "highly deferential." *Cellco Partnership v. FCC,* 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotations omitted). The Court must "presume the validity of the Commission's action," and it may "not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Mobile Relay Associates v. FCC,* 457 F.3d 1, 8 (D.C. Cir. 2006) (quoting *Consumer Electronics Association v. FCC,* 347 F.3d 291, 300 (D.C. Cir. 2003)). This deferential standard also "applies to review of a Commission decision to waive its rules." *AT&T Corp. v. FCC,* 448 F.3d 426, 431 (D.C. Cir. 2006).

NET essentially contends that the Commission has misconstrued its own rules and orders. The Commission's "interpretation of its own orders and rules is entitled to substantial deference." *AT&T,* 448 F.3d at 431. The Court must "give controlling weight to the Commission's interpretation of its own regulations unless it is plainly erroneous or inconsistent with the regulation." *Communications Vending Corp. of Arizona, Inc. v. FCC,* 365 F.3d 1064, 1069 (D.C. Cir. 2004) (internal quotations omitted). Likewise, the Court "must accord deference to [the] agency's reasonable interpretation of its own precedents." *Global Crossing Telecommunications, Inc. v. FCC,* 259 F.3d 740, 746 (D.C. Cir. 2001). "[I]t is well established that an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous." *MCI Worldcom Network Services, Inc. v. FCC,* 274 F.3d 542, 547 (D.C. Cir. 2001) (internal quotations omitted).

ARGUMENT

I. THE COMMISSION PROPERLY APPLIED ITS PAYPHONE COMPENSATION RULES WHEN IT DETERMINED THAT NET WAS RESPONSIBLE FOR COMPENSATING APCC.

In a joint statement framing the issues before the Commission in this proceeding, APCC and NET stipulated that liability hinged on a single issue: "whether Defendants [*i.e.,* NET] or their Customers [*i.e.,* the Debit Card Providers] ... are liable for payphone compensation as a matter of law under the language of the [*First Payphone Reconsideration Order*], including applicable precedent." Revised Joint Statement at 2 (JA). Under applicable FCC precedent, "the underlying, facilities-based carrier" of a payphone call is "required to pay compensation to the PSP in lieu of a non-facilities-based carrier that resells services, for example, to specific subscribers or to debit card users." *First Payphone Order*, 11 FCC Rcd at 20586 (¶ 86). To dispel any doubt about what it meant by a "facilities-based" carrier, the Commission on reconsideration clarified that "a carrier is required to pay compensation and provide per-call tracking for the calls originated by payphones if the carrier maintains its own switching capability, regardless if the switching equipment is owned or leased by the carrier." *First Payphone Reconsideration Order*, 11 FCC Rcd at 21277 (¶ 92).

NET did not dispute that it was a "facilities-based carrier" of the calls at issue. Nonetheless, NET contended that the Debit Card Providers – not NET – should have to pay APCC because each Debit Card Provider is "a downstream reseller that maintains its own switching capability." Dec. 19th Brief at 3-5 (JA -). APCC countered that NET was responsible for paying APCC because the Debit Card Providers are non-facilities-based resellers that have no obligation to pay dial-around compensation under FCC rules. Formal Complaint at 18 (JA).

Interpreting and applying its own payphone compensation rules, the Commission reasonably concluded that NET – not the Debit Card Providers – must compensate APCC. The agency based that conclusion on two separate and independent grounds. First, it found that the Debit Card Providers are not "facilities-based" because they neither own nor lease switches. *Liability Order* ¶ 6 (JA); *see also Bureau Liability Order* ¶¶ 15-21 (JA -). Second, it found that the Debit Card Providers do not perform the call routing functions necessary to "maintain switching capability." *Liability Order* ¶ 6 (JA -); *see also Bureau Liability Order* ¶¶ 10, 22-23 (JA , -).

To obtain reversal of the *Liability Order*, NET must establish that each of the Commission's two separate rationales for holding NET liable was plainly erroneous. *See Communications Vending Corp.*, 365 F.3d at 1069; *MCI Worldcom*, 274 F.3d at 547. Far from carrying that burden, NET has failed to show that either of the FCC's justifications was lacking. Each of the agency's reasonable findings concerning the Debit Card Providers was independently sufficient to support its conclusion that NET was liable.

A. The Commission Reasonably Found That The Debit Card Providers Were Not Liable For Compensating APCC Because They Have No Possessory Interest In Switching Facilities.

Under FCC rules, only "facilities-based" carriers are obligated to pay dial-around payphone compensation. *First Payphone Order*, 11 FCC Rcd at 20586 (¶ 86). In this case, the Commission reasonably found that the Debit Card Providers are not "facilities-based" because they hold no possessory interest in any facilities used to complete payphone calls. *Liability Order* ¶ 6 (JA); *see also Bureau Liability Order* ¶¶ 15-21 (JA -). This interpretation of the Commission's payphone compensation rules was fully consistent with "the commonly understood meaning of the term 'facilities-based.'" *Liability Order* ¶ 6 (JA). That term, which has become "a term of art in the telecommunications industry," is "commonly understood" to refer to "a carrier with some form of *possessory* interest in at least some of the equipment ... used to complete calls." *Bureau Liability Order* ¶ 15 (JA).

The Commission's reading of its own rules also comports with this Court's understanding of how payphone calls are transmitted. In an earlier case, the Court observed that when resellers "do not possess their own switching facilities," they "must rely on an IXC to perform the switching and transmission functions that are required to complete a [payphone] call." *Sprint,* 315 F.3d at 371. Consistent with that premise, the Commission here found that resellers cannot maintain their own switching capability if they have no possessory interest in switching facilities.

NET contends that the "plain language" of the Commission's rules "did not require a possessory interest." NET Br. 16. It points to the Commission's statement in the *First Payphone Reconsideration Order* that a carrier that "maintains its own switching capability" is required to pay dial-around compensation. *Ibid.* (quoting *First Payphone Reconsideration Order*, 11 FCC Rcd at 21277 (¶ 92)). NET asserts that a carrier need not own or lease any switches in order to "maintain" switching capability. *Id.* at 16-18.

NET's argument ignores the context and language surrounding the Commission's allusion to "switching capability" in the *First Payphone Reconsideration Order*. In paragraph 92 of that order, the Commission sought to clarify its earlier statement that only "facilities-based" carriers are required to pay dial-around compensation. *See First Payphone Order*, 11 FCC Rcd at 20586 (¶ 86). Paragraph 92 clarified that a carrier must compensate PSPs for coinless payphone calls "if the carrier maintains its own switching capability, *regardless if the switching equipment is owned or leased by the carrier*." *First Payphone Reconsideration Order*, 11 FCC Rcd at 21277 (¶ 92) (emphasis added). As the italicized phrase makes clear, the sentence on which NET bases its argument plainly contemplated that a carrier could maintain its own switching capability (and thereby qualify as "facilities-based") *only* if it owned or leased switching equipment. That sentence "reflected the prevailing industry understanding that a 'facilities-based' carrier" must have "some form of *possessory* interest in equipment." *Bureau Liability Order* ¶ 19 (JA). The Commission merely intended for paragraph 92 to clarify that, "in the payphone compensation context, the possessory interest requirement for 'facilities-based' carriers may be satisfied not just by outright ownership of facilities," but also "by *leasing* of facilities." *Ibid.*

NET claims that the Commission, in construing paragraph 92, misread the phrase "regardless if the switching equipment is owned or leased by the carrier." According to NET, that phrase "means that it does not matter whether a switching capability is maintained via … ownership or lease *or some other means*." NET Br. 17 (emphasis added). NET's interpretation is unpersuasive. Paragraph 92 says nothing about "some other means" of maintaining switching capability; it refers only to ownership or leasing of switching equipment. Unlike the Commission's interpretation, which faithfully follows the language of paragraph 92, NET's alternative construction of the rules effectively rewrites paragraph 92 to provide that a carrier can maintain switching capability "regardless if the carrier has a possessory interest in switching equipment." That is not what paragraph 92 says.

Even if NET's reading of paragraph 92 were reasonable, NET appears to concede (Br. 28) that the Commission's interpretation of the *First Payphone Reconsideration Order* is also reasonable. And "it is well established that an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous." *MCI Worldcom,* 274 F.3d at 547 (internal quotations omitted).

There is no basis for NET's assertion (Br. 18) that the Commission "expressly permitted a carrier to 'maintain its own switching capability' by contracting with other carriers that physically owned switches." To be sure, the Commission said that facilities-based carriers could hire other entities to track payphone calls. *See First Payphone Reconsideration Order*, 11 FCC Rcd at 21277 (¶ 92). But the Commission did not equate call tracking with "switching capability," as NET mistakenly presumes. Indeed, when the Commission said that facilities-based carriers could contract out their call tracking duties, it specifically distinguished between switching capability and call tracking: "If a carrier *with a switching capability* has technical difficulty in *tracking calls* from origination to termination, it may fulfill its *tracking* and payment obligations by contracting out this duty to another entity ...." *Ibid.* (emphasis added). Similarly, the agency referred separately to call tracking and switching capability when it clarified carriers' obligations under the payphone compensation rules: "[A] carrier is required to pay compensation and *provide per-call tracking* for the calls originated by payphones if the carrier *maintains its own switching capability,* regardless if the switching equipment is owned or leased by the carrier." *Ibid.* (emphasis added). The Commission sensibly recognized that call tracking is not the same thing as switching, which entails "directing calls to their destinations." *See EarthLink, Inc. v. FCC,* 462 F.3d 1, 3 (D.C. Cir. 2006) (quoting *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 371 (1999)).

NET also contends that the Commission deviated from its own precedent when it construed the term "facilities-based" in this case to require a possessory interest in switches. NET Br. 20-22. This argument rests on a flawed premise. Contrary to NET's assertion (Br. 20), the Commission did not claim that it had "*always*" interpreted the term "facilities-based" to require a possessory interest. NET appears to base its argument on the Enforcement Bureau's statement – in a footnote in the *Bureau Liability Order* – that "the term 'facilities-based' always denotes having some form of possessory interest in equipment or capacity." *Bureau Liability Order* at n.35 (JA). But the Commission itself made no such statement. It merely found – and NET does not really dispute – that "the commonly understood meaning of the term 'facilities-based'" includes a possessory interest requirement. *Liability Order* ¶ 6 (JA).

As NET correctly notes, the Commission has occasionally adopted a different definition of "facilities-based" in certain contexts. The precedents cited by NET concern two subjects that are unrelated to payphone compensation: Bell company entry into the long-distance market under 47 U.S.C. § 271 and carriers' eligibility for universal service support under 47 U.S.C. § 214. For purposes of the two statutory provisions governing those particular issues, the Commission concluded in 1997 that unbundled network elements ("UNEs") that a carrier uses to provide service qualify as the carrier's "own" facilities, even though the carrier does not own UNEs.[7] Outside of those specific contexts, however, both the Commission and this Court have recognized that carriers are not "facilities-based" if they provide service exclusively through UNEs. For example, this Court has emphatically distinguished between "the widest possible

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[7] *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan,* 12 FCC Rcd 20543, 20589-98 (¶¶ 86-102) (1997) (interpreting 47 U.S.C. § 271(c)(1)(A)); *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8862-64 (¶¶ 154-168) (1997) (interpreting 47 U.S.C. § 214(e)(1)(A)).

unbundling" of network elements and "genuine, facilities-based competition." *United States Telecom Association v. FCC,* 359 F.3d 554, 576 (D.C. Cir.), *cert. denied,* 543 U.S. 925 (2004).[8]

More generally, it is "commonly understood" throughout the telecommunications industry that the term "facilities-based" describes "a carrier with some form of *possessory* interest in at least some of the equipment ... used to complete [telephone] calls." *Bureau Liability Order* ¶ 15 (JA). It made perfect sense for the Commission to employ this widely accepted definition of "facilities-based" in the payphone compensation context. A "possessory interest requirement creates a bright-line, easily administrable test for determining the identity" of the party responsible for dial-around compensation. *Id.* ¶ 20 (JA). Compared to a switchless reseller, a carrier "with a possessory interest in the telecommunications equipment used to complete [payphone] calls" is usually easier for PSPs to find and "more likely to be ... capable of paying its bills." *Ibid.* Therefore, in an effort "to ensure that PSPs receive compensation for every completed coinless payphone call," the Commission sensibly adopted rules that link compensation liability to a possessory interest in switches. *Ibid.* It properly applied those rules here.

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[8] *See also Qwest Corp. v. FCC,* 482 F.3d 471, 479-81 (D.C. Cir. 2007) (the Commission reasonably forbore from requiring unbundling in wire centers with "sufficient facilities-based competition" to meet consumers' needs); *United States Telecom Association v. FCC,* 290 F.3d 415, 429 (D.C. Cir. 2002) (mandatory unbundling is unwarranted "in a market that already has intense facilities-based competition") (internal quotations omitted), *cert. denied,* 538 U.S. 940 (2003); *Unbundled Access to Network Elements,* 20 FCC Rcd 2533, 2654 (¶ 220) (2005) (finding that "facilities-based" carriers could not effectively compete with carriers that provided service solely through UNEs), *aff'd, Covad Communications Co. v. FCC,* 450 F.3d 528 (D.C. Cir. 2006).

B. The Commission Reasonably Found That The Debit Card Providers Were Not Liable For Compensating APCC Because They Do Not Physically Route Payphone Calls.

Even if NET were correct that a carrier could somehow "maintain" switching capability without owning or leasing any switches – and it is not – the record contained no evidence that the Debit Card Providers maintain any such capability. At a minimum, switching capability includes "the basic switching function of receiving and routing calls." *Bureau Liability Order* ¶ 23 (JA). For purposes of payphone compensation, a carrier maintains switching capability only if it "physically routes" payphone calls. *Id.* ¶ 8 (JA). NET never claimed that the Debit Card Providers actually routed any of the calls in question. Accordingly, the Commission rightly determined that the Debit Card Providers were not responsible for compensating APCC because they maintain no switching capability.

NET contends (Br. 22-23) that the Debit Card Providers maintain switching capability because they have the same ability to track calls that NET does. NET asserts: "According to FCC precedent, the 'essential' switching capability is the ability to track calls." NET Br. 23 (quoting *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 18 FCC Rcd 11003, 11013 (¶ 22) (2003)). To the contrary, in the payphone compensation context, the Commission has never characterized call tracking as a "switching capability." Indeed, when it first announced that carriers that maintain switching capability are responsible for payphone compensation, the Commission plainly distinguished between call tracking and switching capability: "[A] carrier is required to pay compensation and *provide per-call tracking* for the calls originated by payphones if the carrier *maintains its own switching capability*, regardless if the switching equipment is owned or leased by the carrier." *First Payphone Reconsideration Order,* 11 FCC Rcd at 21277 (¶ 92) (emphasis added).

Moreover, NET is wrong to suggest (Br. 23) that the Commission's only "reason for imposing a facilities-based requirement" when assessing dial-around compensation liability "was to ensure that carriers have call tracking capability." While the Commission recognized that facilities-based carriers would generally be able to track payphone calls more easily than non-facilities-based resellers could, it also reasoned that imposing liability on facilities-based carriers would facilitate PSPs' efforts to locate the parties responsible for compensation. Because "telecommunications services are often sold in advance, *particularly in the debit card context,* and resold more than once before a caller ultimately uses the service," PSPs would have difficulty identifying "the party that is liable for the per-call compensation" if that party were a switchless reseller (like the Debit Card Providers). *First Payphone Order,* 11 FCC Rcd at 20586 (¶ 86) (emphasis added). Even if a switchless reseller had call-tracking ability, it is unlikely that the reseller could "be easily traced down the potentially long chain of entities with a financial interest in the completion of [a payphone] call." *Bureau Liability Order* ¶ 20 (JA). "By contrast," a facilities-based carrier was "more likely to be found" by PSPs seeking compensation. *Ibid.*

NET also argues (Br. 23-25) that the Commission's *Liability Order* ignored "additional switching functionalities" that the Debit Card Providers controlled. But NET failed to point out this alleged oversight to the Commission. Under section 405 of the Communications Act, 47 U.S.C. § 405, this Court "may not consider 'arguments that have not first been presented to the Commission.'" *Charter Communications, Inc. v. FCC,* 460 F.3d 31, 39 (D.C. Cir. 2006) (quoting *BDPCS, Inc. v. FCC,* 351 F.3d 1177, 1182 (D.C. Cir. 2003)); *see also Action for*

Children's Television v. FCC, 906 F.2d 752, 754-55 (D.C. Cir. 1990) (section 405 precluded review of a claim that the Commission failed to address petitioners' comments).[9]

In any event, none of the "additional" functionalities identified by NET would alter the Commission's analysis here. Even assuming that the Debit Card Providers have all of the additional capabilities described by NET, which amount to nothing more than the ability to access and control end user accounts, such capabilities play no role in the physical routing of calls – the *sine qua non* for maintaining switching capability.[10] As the courts have repeatedly recognized, switching entails the routing of telephone calls through switches.[11] The Commission reasonably concluded that carriers do not "maintain switching capability" unless they perform the quintessential switching function: routing telephone calls. That conclusion easily satisfies the deferential standard of review. *See Global Crossing,* 259 F.3d at 746.

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[9] Of course, if the Commission overlooked some of NET's arguments when analyzing the issue of liability, any such oversights would not have become apparent to NET until the agency issued the *Liability Order*. But that would not excuse NET from complying with the requirements of section 405: "[E]ven when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file a petition for reconsideration with the Commission before it may seek judicial review." *Qwest,* 482 F.3d at 474 (quoting *In re Core Communications, Inc.,* 455 F.3d 267, 276-77 (D.C. Cir. 2006)); *see also* 47 U.S.C. § 405(a).

[10] An affidavit from NET's managing partner makes a vague passing reference to a "call routing" capability. *See* Hutchison Affidavit ¶ 5 (JA); NET Br. 24. But NET has never argued – either here or before the Commission – that the Debit Card Providers were able to control the routing of calls. Indeed, NET does not dispute the Enforcement Bureau's finding that the Debit Card Providers "played no role in actually transporting calls." Br. 17 (citing *Bureau Liability Order* ¶ 10 (JA)). And NET did not challenge that finding when it applied for Commission review of the *Bureau Liability Order*.

[11] *See, e.g., Verizon Communications Inc. v. FCC*, 535 U.S. 467, 490 (2002) (a phone call is "routed" through a "hierarchy of switches to the intended telephone"); *AT&T,* 525 U.S. at 371 (defining switches as "equipment directing calls to their destinations") (quoted in *EarthLink,* 462 F.3d at 3); *Covad,* 450 F.3d at 546 ("switches route a signal from a caller to a receiver"); *SBC Communications Inc. v. FCC*, 373 F.3d 140, 142 (D.C. Cir. 2004) (switches are used to "route calls … among the local phone wires and the trunks that connect various exchanges"); *Competitive Telecommunications Association v. FCC*, 309 F.3d 8, 10 (D.C. Cir. 2002) (switches are "used to route calls to their destination").

NET claims that carriers can "maintain switching capability" even though they play no part in routing telephone calls. NET's proposed test for payphone compensation liability "eliminates the key distinction between entities that actually route calls" and "entities that merely resell services." *Bureau Liability Order* ¶ 20 (JA). The Commission rightly refused to adopt that test, finding it "vague, ambiguous, and ripe for confusion and litigation." *Ibid.* Instead, the Commission reasonably determined that the Debit Card Providers do not maintain switching capability because they do not actually route calls. The Court should uphold that sensible conclusion.

C. NET's Remaining Challenges To The *Liability Order* Are Barred By Section 405 And, In Any Event, Are Meritless.

NET makes a number of other attacks on the *Liability Order* (*see* Br. 25-35), but it did not present any of those arguments to the Commission before seeking judicial review. Therefore, pursuant to 47 U.S.C. § 405, the Court lacks jurisdiction to consider those claims. *See Qwest,* 482 F.3d at 474 (quoting *Core,* 455 F.3d at 276); *Verizon Telephone Cos. v. FCC,* 453 F.3d 487, 499 n.3 (D.C. Cir. 2006).

In particular, NET never asked the Commission to find that the Debit Card Providers were liable for dial-around compensation by virtue of their contracts with NET. Yet NET now asserts (Br. 25) that those contracts "made [the Debit Card Providers] liable." It purports to find support for its position in *Bell Atlantic,* 16 FCC Rcd at 8118-19 (¶ 14).[12] Even if this argument were not procedurally barred, it lacks merit.

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[12] NET made a similar argument at an early stage in this proceeding. *See* Dec. 19th Brief at 8-9 (JA -). The Enforcement Bureau rejected NET's contract claim. *Bureau Liability Order* ¶¶ 24-25 (JA -). In its application for review of the *Bureau Liability Order*, NET did not ask the Commission to revisit the contract issue. Consequently, NET waived the issue. *See Bartholdi Cable Co. v. FCC,* 114 F.3d 274, 279 (D.C. Cir. 1997).

In *Bell Atlantic*, the Commission found that the first facilities-based carrier of a payphone call is not liable for dial-around compensation if a "reseller has identified itself … as being responsible for paying compensation." *Bell Atlantic*, 16 FCC Rcd at 8119 (¶ 14). But the Commission also made clear that only "switch-based" resellers could assume responsibility for compensating PSPs. *See id.* at 8118 (¶ 13). Unlike the resellers in *Bell Atlantic*, the Debit Card Providers in this case are not "switch-based"; they neither own nor lease switches. NET cannot use contracts to shift its liability for payphone compensation to switchless resellers such as the Debit Card Providers.[13]

NET has also waived the claim (Br. 26-32) that it did not receive "fair notice" of the rules that the Commission applied here. NET failed to raise this issue during the administrative proceeding. But even if the "fair notice" argument had not been waived, it could not withstand scrutiny.

The "fair notice" doctrine invoked by NET applies only in cases, unlike here, where an agency imposes some sort of sanction on a party that has violated a rule. "Traditional concepts of due process … preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broadcasting Co. v. FCC,* 824 F.2d 1, 3 (D.C. Cir. 1987). Thus, the "fair notice" doctrine applies only in cases where an

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[13] While NET cannot avoid responsibility for compensating APCC, it may be able to recover its payphone compensation costs from the Debit Card Providers. Under FCC rules, a facilities-based carrier with reseller customers is free to negotiate contracts "that would require [each] reseller to reimburse the facilities-based carrier for the actual payphone compensation amounts associated with that particular reseller." *First Payphone Order,* 11 FCC Rcd at 20586 (¶ 86).

agency levies a fine,[14] orders a product recall,[15] dismisses or denies an application,[16] or imposes any other criminal or civil sanctions against parties that violate the agency's rules.

"If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Gates & Fox Co. v. Occupational Safety & Health Review Commission,* 790 F.2d 154, 156 (D.C. Cir. 1986) (internal quotations omitted). But the Court has refrained from applying this "fair notice" doctrine to an agency's interpretation of its own rules "in a non-penal context." *Ibid.*; *see also General Electric,* 53 F.3d at 1329-30. For example, the Court held that the Commission could retroactively require AT&T to pay substantial amounts of universal service support on the basis of its calling card revenues, even though the rules governing this issue had heretofore been ambiguous. *See American Telephone & Telegraph Co. v. FCC,* 454 F.3d 329 (D.C. Cir. 2006).

More recently, in a case where the Commission ruled that prepaid calling card providers must pay millions of dollars in access charges, the Court reaffirmed the well-established principle that an agency's adjudication of the respective rights and responsibilities of private parties generally applies retroactively, even if it clarifies previously ambiguous agency rules: "Clarifying the law and applying that clarification to past behavior are routine functions of adjudication." *Qwest Services Corp. v. FCC,* 2007 WL 4232964, * 6 (D.C. Cir. Dec. 4, 2007). In words that could just as easily describe NET's situation, the Court observed in *Qwest*: "The

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[14] *See Fabi Construction Co. v. Secretary of Labor,* 2007 WL 4165421 (D.C. Cir. Nov. 27, 2007); *General Electric Co. v. EPA,* 53 F.3d 1324 (D.C. Cir. 1995).

[15] *See United States v. Chrysler Corp.,* 158 F.3d 1350 (D.C. Cir. 1998).

[16] *See Trinity Broadcasting of Florida, Inc. v. FCC,* 211 F.3d 618 (D.C. Cir. 2000); *Satellite Broadcasting,* 824 F.2d at 3-4.

mere possibility that a party may have relied on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when that law is finally clarified." *Id.* at * 7.[17]

Like these other FCC adjudications, this case did not involve the imposition of any civil or criminal penalties. Rather, the Commission in this adjudicatory proceeding merely rendered a decision regarding NET's obligations toward APCC under the agency's existing payphone compensation rules. In this sort of standard adjudication, the Commission may enforce its own rules retroactively even if those rules were not entirely clear prior to the adjudication, so long as the Commission's interpretation of those rules is reasonable (as it is here). The "fair notice" doctrine does not govern this type of case.[18]

NET's final attacks on the *Liability Order* concern the Commission's finding that NET was the "last" non-LEC carrier of the calls at issue. NET argues (Br. 32-33) that the Commission's rules for the relevant period did not impose dial-around compensation liability on the last non-LEC carrier. NET also contends (Br. 33-35) that there was insufficient evidence for the agency to find that NET was the last non-LEC carrier. NET never presented either of these claims to the Commission. Instead, its application for review of the *Bureau Liability Order* focused on two very different issues: (1) the Bureau's finding that a "facilities-based" carrier

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[17] *See also American Telephone & Telegraph,* 454 F.3d at 334 ("Rather than exercising caution in light of ambiguous agency law, AT&T unilaterally chose not to pay universal service contributions without Commission sanction or approval. In doing so it assumed the risk of an adverse Commission decision.").

[18] It is understandable why the "fair notice" doctrine does not apply here. Application of the doctrine in the adjudicatory context to absolve parties from liability would be fundamentally unfair to other parties (such as PSPs) that are owed compensation. As the Court recently noted, "every loss that retroactive application of" an FCC ruling "would inflict on" parties that are liable for compensation "is matched by an equal and opposite loss that non-retroactivity would inflict on" parties that have not yet received payment for services rendered. *Qwest,* 2007 WL 4232964, * 7.

must have a possessory interest in switches; and (2) its related finding that the Debit Card Providers do not maintain their own switching capability. Application for Review at 10-18 (JA -). NET's application for review did not even mention the Bureau's determination that NET was the last non-LEC carrier. Having raised no objection to that finding before the Commission, NET cannot now challenge that finding here. *See* 47 U.S.C. § 405(a); *Freeman Engineering Associates v. FCC,* 103 F.3d 169, 182-85 (D.C. Cir. 1997).

In any event, the "last carrier" has no bearing on the question that the parties asked the Commission to decide here: whether NET or the Debit Card Providers must compensate APCC. The parties expressly stipulated that either NET or the Debit Card Providers would be responsible for paying APCC under the Commission's rules. *See* Revised Joint Statement at 2 (JA). Consequently NET's suggestion (Br. 33-35) that someone other than NET or the Debit Card Providers might have been the "last carrier" is a red herring. Because the Debit Card Providers have no possessory interest in switches and maintain no switching capability, those entities are not liable for dial-around compensation under FCC rules. Therefore, in resolving the question posed by the parties to this proceeding, the Commission correctly concluded that NET – not the Debit Card Providers – must pay APCC.

II. THE COMMISSION REASONABLY DECIDED TO WAIVE THE TIMING COMPONENT OF ITS "RELATION-BACK" RULE IN THIS CASE.

The FCC has the authority to waive any provision of its rules for "good cause." 47 C.F.R. § 1.3. "The Commission may waive its rules if particular facts would make strict compliance inconsistent with the public interest." *Keller Communications, Inc. v. FCC,* 130 F.3d 1073, 1076 (D.C. Cir. 1997) (internal quotations omitted), *cert. denied*, 524 U.S. 954 (1998); *see also AT&T,* 448 F.3d at 433. In deciding whether to grant a waiver, the agency may "take into account considerations of hardship, equity, or more effective implementation of overall policy." *WAIT Radio v. FCC,* 418 F.2d 1153, 1159 (D.C. Cir. 1969). The Commission may grant a waiver "when special circumstances warrant it and the waiver will serve the public interest." *Delta Radio, Inc. v. FCC,* 387 F.3d 897, 900 (D.C. Cir. 2004) (internal quotations omitted). This Court's review of a Commission decision to waive its rules is deferential. *AT&T,* 448 F.3d at 431.

In this case, the Commission found good cause to waive the timing component of rule 1.718, the "relation-back" rule. Under that rule, the filing of a formal complaint "will be deemed to relate back to the filing date" of a pending informal complaint concerning the same cause of action, 47 C.F.R. § 1.718, "but only if the formal complaint is filed within six months after the defendant's response to the informal complaint." *Waiver Order* ¶ 4 (JA). On the last day of this six-month period, APCC filed and served its formal complaint. But it failed to take account of a recent change in FCC rules, and it submitted the wrong filing fee with the formal complaint ($165 per defendant instead of the required $170). As a result, APCC's initial submission was rejected by Mellon Bank, which serves as the Commission's intake agent. Fifteen days later, APCC submitted a revised version of the formal complaint along with the correct filing fee and a request for a waiver of the "relation-back" filing deadline. *Id.* ¶¶ 5-7 (JA).

Without a waiver, a minor error by APCC's counsel would inflict a severe hardship on many PSPs: the loss of substantial sums of dial-around compensation that Congress intended for them to receive. The Commission saw no reason to allow "a $5.00 fee error by APCC's counsel" to deprive numerous PSPs "of their right under section 276" to hundreds of thousands of dollars in payphone compensation. *Damages Order* ¶ 23 (JA).

Aside from the fee error, APCC's "formal complaint was otherwise submitted and served on time and in good faith, with advance notice to" NET. *Damages Order* ¶ 23 (JA).

Moreover, given the extensive contacts between the parties in the weeks before the filing deadline, "NET knew all along that, in the absence of a settlement, APCC planned to file a formal complaint." *Waiver Order* ¶ 12 (JA). In these circumstances, it was reasonable to assume that "waiving the filing deadline would not materially undermine" the "primary purpose" of rule 1.718: "to ensure finality, certainty, and repose for prospective defendants." *Ibid.*

Denying APCC's waiver request, on the other hand, would have precluded numerous PSPs from collecting hundreds of thousands of dollars in statutorily mandated compensation. Weighing the equities in this case, the Commission reasonably decided that "under these specific circumstances, strict enforcement of [the] six-month relation-back deadline would unduly conflict with the public interest in ensuring the payment of compensation necessary to 'promote the widespread deployment of payphone services to the benefit of the general public.'" *Damages Order* ¶ 23 (JA) (quoting 47 U.S.C. § 276(b)(1)).[19]

NET claims (Br. 36-38) that the Commission exceeded its authority by effectively waiving the two-year statute of limitations established by 47 U.S.C. § 415(b). That is incorrect. Section 415(b) states that "complaints" must be filed within two years from the time a cause of action accrues. The Commission reasonably found that an informal complaint filed in accordance with FCC rules "constitutes a complaint within the meaning of section 415." *Damages Order* ¶ 16 (JA) (internal quotations omitted). Under this reasonable reading of the statute, APCC's filing of the informal complaint on September 30, 2002 satisfied the statute of limitations prescribed by section 415(b). After APCC filed its informal complaint within the

[19] Nonetheless, because APCC's fee error was easily avoidable, the Commission did not grant APCC's waiver request in full. It excluded from the scope of the waiver "any prejudgment interest accrued during the 15-day period between the date on which APCC should have filed its formal complaint with the correct fee (May 19, 2003) and the date on which APCC effectively filed its formal complaint with the correct fee (June 3, 2003)." *Damages Order* ¶ 22 (JA -).

statutory limitations period, "the question whether APCC's subsequent formal complaint was sufficiently timely" to relate back to the informal complaint's filing date "was a matter purely of the Commission's rules regarding the internal management of its complaint proceedings." *Damages Order* ¶ 24 (JA). Because "the *Waiver Order* had no effect on the statutory limitations period, and pertained only to the Commission's relation-back rules," that order fell "squarely within the Commission's authority." *Ibid.*

NET also asserts (Br. 38-39) that the Commission failed to apply the appropriate waiver standard here. It maintains that the agency should have evaluated APCC's waiver request under the stricter standard articulated in *Meredith,* 9 FCC Rcd at 6842 (¶¶ 6-7).[20] That standard, however, "applies only to filing deadlines for pleadings that '*initiate* adjudicatory proceedings.'" *Damages Order* ¶ 26 (JA) (quoting *Meredith,* 9 FCC Rcd at 6843 (¶ 9)). APCC's informal complaint initiated this proceeding; "the formal complaint simply continued it." *Ibid.* (JA). Indeed, this continuity between the informal and formal complaint proceedings is the rationale behind the relation-back rule. Therefore, the Commission properly found that the *Meredith* waiver standard did not apply to the filing deadline for APCC's formal complaint.[21]

Finally, NET argues (Br. 40-41) that it was improper for the Commission to grant a waiver on the basis of PSPs' potential loss of compensation. That claim is baseless. This Court has long recognized that the Commission "may take into account considerations of hardship"

[20] In *Meredith,* the Commission stated that waivers of filing deadlines would be granted only upon a showing of "unusual or compelling circumstances" involving "a calamity of a widespread nature that even the best of planning could not have avoided, such as an earthquake or a city-wide power outage which brings transportation to a halt." 9 FCC Rcd at 6842 (¶ 6) (internal quotations omitted).

[21] The Commission further noted that in this case, unlike in *Meredith*, the party seeking a waiver had submitted and served its pleading before the deadline: "For this reason, too, the Bureau was correct in applying the general waiver standard, rather than the *Meredith* waiver standard, in the *Waiver Order*." *Damages Order* ¶ 27 (JA).

when deciding whether to waive a rule. *See WAIT Radio,* 418 F.2d at 1159. And in evaluating the propriety of waiver in individual cases, the Commission has frequently assessed the harm that would result if a waiver request were denied.[22] Thus, it was entirely appropriate for the Commission to consider the hardship that PSPs would face if APCC did not obtain a waiver.

The hardship factor carried even greater weight in this case because any obstacle to PSPs' recovery of full and fair compensation would have adversely affected the general public. The Commission reasonably concluded that "strict enforcement of [the] six-month relation-back deadline would unduly conflict with the public interest in ensuring the payment of compensation necessary to 'promote the widespread deployment of payphone services to the benefit of the general public.'" *Damages Order* ¶ 23 (JA) (quoting 47 U.S.C. § 276(b)(1)). That finding amply justified waiver of the timing component of the "relation-back" rule. The Commission has the discretion to waive a rule "if particular facts would make strict compliance inconsistent with the public interest." *Keller Communications,* 130 F.3d at 1076 (internal quotations omitted). It properly exercised that discretion here.

III. THE COMMISSION REASONABLY AWARDED PREJUDGMENT INTEREST TO APCC AT AN ANNUAL RATE OF 11.25 PERCENT.

In the course of crafting its payphone compensation rules, the Commission determined that an annual interest rate of 11.25 percent should apply to late compensation payments to PSPs. *Third Payphone Order*, 14 FCC Rcd at 2631 (¶ 189). The Commission explained that "11.25% is the appropriate cost of capital for payphone providers" in the context of delayed payphone

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[22] *See, e.g., Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School,* 21 FCC Rcd 5316, 5321, 5323-26 (¶¶ 11, 14, 16, 20, 22) (2006); *Federal-State Joint Board on Universal Service,* 21 FCC Rcd 1717, 1719-20 (¶¶ 7-8) (Wireline Comp. Bur. 2006); *Metricom, Inc.'s Request for Waiver of Section 27.208(a) of the Commission's Rules,* 13 FCC Rcd 890, 892 (¶ 7) (Wireless Tel. Bur. 1998).

compensation because most payphones "are owned by large [LECs]," and because the FCC's "authorized interstate rate of return" for those LECs – 11.25 percent – reflects "a weighted average of debt and equity costs." *Second Payphone Order*, 13 FCC Rcd at 1806 (¶ 60). The Commission and its staff have repeatedly applied the 11.25 percent interest rate to cases involving late payments of dial-around compensation, whether or not the PSP seeking compensation is a LEC.[23] Consistent with those precedents, the Commission reasonably awarded prejudgment interest to APCC at an annual rate of 11.25 percent.

NET contends (Br. 41-42) that the Commission should have used the lower IRS interest rate in this case. It points out that in two of the agency's payphone reconsideration orders, the Commission applied the IRS rate instead of the 11.25 percent rate.[24] Those orders, however, involved "the very different context of one-time … true up payments" that became necessary after this Court's remands of the Commission's first two orders implementing section 276. *Fourth Payphone Reconsideration Order*, 17 FCC Rcd at 2033 (¶ 33). In addressing those remands, the Commission determined that PSPs had been under-compensated during one time period and over-compensated during another. In that unique context, the Commission noted that "the interest rate could apply to payments flowing both ways" – not only from carriers to PSPs, but also from PSPs to carriers. *Id.* at 2032 (¶ 33); *see also Fifth Payphone Reconsideration Order*, 17 FCC Rcd at 21307-08 (¶ 100). Under those circumstances, the Commission recognized that an interest rate reflecting the "LEC capital cost" was "not appropriate for all such

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[23] *See, e.g., Update Order,* 19 FCC Rcd at 15661 (¶ 79); *APCC Services,* 19 FCC Rcd at 10466 (¶ 22); *Illinois Bell,* 16 FCC Rcd at 16703 (¶ 13) & n.43; *Bell Atlantic,* 16 FCC Rcd at 8120 n.43.

[24] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 17 FCC Rcd 2020, 2032 (¶¶ 31-32) (2002) ("*Fourth Payphone Reconsideration Order*"); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 17 FCC Rcd 21274, 21307-08 (¶¶ 99-101) (2002) ("*Fifth Payphone Reconsideration Order*").

transactions" (particularly the payments from PSPs to carriers). *Fourth Payphone Reconsideration Order*, 17 FCC Rcd at 2033 (¶ 33). In that unusual "one-time-payment" situation, the Commission found that the "commercially oriented" IRS interest rate was "most suitable." *Ibid.* At the same time, the agency emphasized that the use of an interest rate reflecting the LEC cost of capital "remains fitting in its context" – *i.e.,* in cases (like this one) concerning late compensation payments to PSPs. *Ibid.*[25]

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[25] NET notes (Br. 42) that after the Commission applied the IRS interest rate in the *Fourth Payphone Reconsideration Order*, the Enforcement Bureau directed APCC to explain why the 11.25 percent rate should apply to a carrier's failure to pay dial-around compensation in another proceeding. *See APCC Services, Inc. v. TS Interactive, Inc.*, 17 FCC Rcd 25523, 25529 n.31 (Enf. Bur. 2002). Later in that same proceeding, however, the Bureau declared: "The Commission has previously stated that an 11.25 percent interest rate is appropriate for late payment of dial-around compensation, and we therefore will allow 11.25 percent interest here." *APCC Services,* 19 FCC Rcd at 10466 (¶ 22).

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

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January 14, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NetworkIP, LLC and Network Enhanced Telecom, LLP, PETITIONERS, v. Federal Communications Commission and United States Of America, Respondents.	))))))))))	NOS. 06-1364 & 07-1092

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13100 words.

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January 14, 2008

STATUTORY APPENDIX

47 U.S.C. § 405

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 U.S.C. § 405 (continued)

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NetworkIP, LLP and Network Enhanced Telecom, LLP, Petitioners,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing typewritten "Brief For Respondents" was served this 14th day of January, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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